Supreme Court, U.S.
FILED

181

No. (1) 101004

FEB 4 - 2011

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In The
Supreme Court of the United States

PIRELLI PNEUS LTDA.,

Petitioner,

vs.

GARY GUNN, Individually, and as guardian of KATHY GUNN, his wife, an incapacitated person,

Respondents.

On Petition For Writ Of Certiorari To The Second District Court Of Appeal For The State Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether due process limitations permit the exercise of jurisdiction over the foreign producer of an allegedly defective product, based on the forum contacts of distributors of the product, without evidence showing either control by the producer over the distributors or some legally recognized basis for disregarding their separate corporate identities.

PARTIES

The parties to the proceedings for which review is sought are:

Respondents Gary Gunn, individually, and as guardian of Kathy Gunn, his wife, who are the plaintiffs in the proceedings below;

Petitioner Pirelli Pneus Ltda., one of several defendants below;

Pirelli & C. S.p.A., Pirelli Tyre S.p.A., and Pirelli Tyre Holland N.V., who were defendants below, and have been dismissed on jurisdictional grounds, with no appeal of their dismissal; and

Pirelli Tire LLC, Pirelli North America, Inc., Francisco's Custom Body Shop, Inc., and Lemans Corporation d/b/a Parts Unlimited, defendants below who have made no challenge to jurisdiction.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioner, Pirelli Pneus Ltda., hereby discloses that it is incorporated under the laws of Brazil and is a subsidiary of Pirelli Tyre S.p.A., an Italian corporation. Neither Pirelli Pneus Ltda. nor Pirelli Tyre S.p.A. are publicly traded in the United States of America.

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OPINIONS BELOW

The per curiam opinion of Florida's Second District Court of Appeal is unpublished, and is in the Appendix, at App. 1-2. Also in the Appendix, at App. 8-11, are the Circuit Court's Order on multiple Motions to Dismiss and Judicial Notice and the Circuit Court's Order Granting Pirelli Pneus' Motion for Clarification of the Court's Order issued May 6, 2010, and its incorporated Amended Order on Multiple Motions to Dismiss and Judicial Notice, at App. 3-7.

STATEMENT OF JURISDICTION

The decision of the Second District Court of Appeal was filed on December 29, 2010. As there was no written opinion, there are no grounds for seeking review by the Florida Supreme Court. *See* Fla. Const. Art. V, § 3. The United States Supreme Court has jurisdiction to review the decision of the Second District Court of Appeal pursuant to 28 U.S.C. § 1257, as, given the unavailability of review by the Florida Supreme Court, that decision is a final decision on jurisdiction rendered by the highest court of Florida in which a decision could be obtained, and rejects a constitutional due process claim that the Florida courts should not exercise personal jurisdiction over Petitioner. *See, e.g., Nash v. Florida Ind. Comm'n*, 389 U.S. 235, 237 n.1 (1967).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The question presented involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

Gary Gunn, individually and as guardian of his wife, Kathy Gunn ("Plaintiffs"), filed suit in the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, seeking to recover damages allegedly suffered in a motorcycle accident in Kansas. Plaintiffs allege that the accident was caused by a defective motorcycle tire manufactured by Pirelli Pneus Ltda. ("Pneus"). Plaintiffs claimed Pneus was aware of the distributive system by which the subject tire moved from its place of manufacture, Brazil, until it was purchased and installed onto their motorcycle in Florida.

After the tire was produced by Pneus in Brazil, and before ever leaving that country, title to the tire transferred to Lemans Corporation d/b/a Parts Unlimited ("Lemans"), which took title at the loading dock in Brazil. Lemans brought the tire into the

United States, where it was eventually delivered to Francisco's Custom Body Shop, Inc. ("Francisco's"). Francisco's sold the tire to Mr. Gunn, and installed it onto his motorcycle. While Mr. and Mrs. Gunn were both riding the motorcycle on a highway near Russell, Kansas, the tire allegedly failed and they crashed, suffering injuries.

In response to the complaint, Pneus along with other foreign Pirelli entities: Pirelli Tyre, S.p.A., Pirelli Tyre Holland N.V., and Pirelli & C. S.p.A. ("Other Foreign Pirelli Defendants") moved for, inter alia, dismissal for lack of jurisdiction. Affidavits were submitted in support of the motions for dismissal. While Plaintiffs raised objections to the form of the affidavits, the Circuit Court accepted the evidence submitted by Pneus and the Other Foreign Pirelli Defendants and relied upon this evidence to dismiss the Other Foreign Pirelli Defendants. Plaintiffs argued that information on the internet, coupled with invoices and bills of lading, indicated the existence of a chain of distribution for the tire at issue, and that all parties involved with that alleged distribution network should be subject to jurisdiction in Florida. The trial court refused to take judicial notice of much of the information. The remaining information does not evidence the degree of relatedness of Pneus to the entities in the distribution chain, any control by Pneus over the distribution chain, or any evidence sufficient to show alter ego status or other grounds for disregarding the separate corporate entities. The shipping documents show that the tires were shipped

"ex works," which indicates that the seller delivered the goods at its own place of business and the buyer paid all transportation costs and bore all risks of shipment.

The Circuit Court granted dismissal of the Other Foreign Pirelli Defendants, but denied dismissal as to Pneus. The Court gave no explanation for the differential treatment of these defendants, and the only apparent factual distinction is that Pneus manufactured the tire.

Florida's Second District Court of Appeal affirmed the Circuit Court's denial of dismissal as to Pneus, without explanation. This petition timely follows.

ARGUMENTS FOR GRANTING CERTIORARI

The jurisdictional issue presented by this petition merits Supreme Court review because: (1) state and federal courts are in continuing conflict and in need of guidance regarding the exercise of jurisdiction over foreign producers based on allegedly defective products arriving in the United States by a stream of commerce; (2) additional delay in resolving this conflict would serve no public interest; (3) the question is important as it arises frequently, involves a preliminary issue for which clarity is needed, affects national and international commerce, and the split of authority presents a ready market for forum shopping; and (4) the Court has already granted review in

two other cases presenting issues which subsume the jurisdictional question here, rendering this petition appropriate for resolution by GVR.

I. Courts Are In Conflict

In *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987), this Court ruled that a defendant's mere awareness that components it manufactured, sold, and delivered outside the United States would reach the forum state in a stream of commerce was not sufficient to satisfy due process limitations on the exercise of jurisdiction over a foreign defendant. However, that ruling was a fractured set of opinions, expressing separate standards for deciding the issue, none of which received the support of a majority of the Court.

Justice O'Connor announced the judgment of the Court, finding no jurisdiction over the foreign defendant. But portions of her opinion – including a key section regarding founding jurisdiction upon the location of goods arriving by a stream of commerce – were joined by only three other Justices (Rehnquist, Powell, and Scalia). Under Justice O'Connor's view, placement of a product into a stream of commerce with awareness that it may be carried into a forum state would not, by itself, be adequate for the exercise of jurisdiction over a defendant. *Asahi*, 480 U.S. at 108-13 (O'Connor, J., concurring). Justice Brennan wrote a separate opinion, key portions of which also received the support of only four Justices (Brennan,

White, Marshall, and Blackmun), which disagreed with Justice O'Connor's view, and expressed the position that a chain of distribution carrying a product into the forum should be adequate to permit the exercise of jurisdiction over foreign defendants. *Asahi*, 480 U.S. at 116-21 (Brennan, J., concurring). Justice Stevens joined neither of these opinions, and separately presented his own views (joined by Justices White and Blackmun) that the jurisdictional question in such cases should depend upon the volume, value, and hazardous character of the products involved. *Asahi*, 480 U.S. at 121-22 (Stevens, J., concurring).

Ever since the Court's decision in *Asahi*, state and federal courts have struggled with the inconsistent views set forth in these separate opinions. In the ensuing nearly quarter century, courts and commentators have found repeated cause to note the continuing disarray, and plead for the Supreme Court to resolve the ongoing conflict and restore clarity to jurisdictional jurisprudence. *See, e.g., Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 474 (5th Cir.), *cert. denied*, 548 U.S. 904 (2006) (DeMoss, J., concurring) ("I urge the Supreme Court to resolve" the circuit split); Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 Cap. U.L. Rev. 681 (2009); 4 Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 1067.4 (3d ed.) ("there is considerable room for more guidance from the Supreme Court on this

issue"). In one recently published chart illustrating this conflict, the standard described in Justice O'Connor's opinion is followed by five Circuits, twenty-eight States, and the District of Columbia. Justice Brennan's opinion is followed by three Circuits and fourteen States. Other states are undecided, or follow a hybrid test that, typically, attempts to synthesize the separate decisions in *Asahi*. Laughlin, 37 Cap. U.L. Rev. at 727.

The uncertainties generated by the conflict between the competing constitutional standards as described above are magnified by an accompanying split of authority over evidentiary burdens and procedures in resolving jurisdictional disputes. *See* Laughlin, 37 Cap. U.L. Rev. at 710-12. Some courts permit a plaintiff's bare pleading allegations to satisfy the initial burden without any evidence unless the defendant first presents evidence to defeat the alleged grounds for the exercise of jurisdiction. *See Turnock v. Cope*, 816 F.2d 332, 333 (7th Cir. 1987); *Dowless v. Warren-Rupp Houdailles, Inc.*, 800 F.2d 1305, 1307 (4th Cir. 1986). Others require a plaintiff to present evidence when jurisdiction is challenged without requiring an initial proffer of evidence by the defense. *See, e.g., Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). Some courts place the burden on the defendant to demonstrate that the exercise of jurisdiction would be unreasonable. *See, e.g., Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247 (11th Cir. 2000); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir.), *cert.*

denied, 519 U.S. 1006, 1007 (1996). Others hold that the burden on all issues relevant to jurisdiction remains with the plaintiff. *See, e.g., Richards v. Aramark Servs., Inc.*, 108 F.3d 925, 928 (8th Cir. 1997).

The uncertainties regarding the appropriate procedures and burdens of proof, stacked upon the uncertainties over what factors should be considered as governing the jurisdictional inquiry, present a jurisprudential botch of contradictory rules governing what should be a straightforward threshold determination. These conflicts are real. They are extensive. They have proven to be enduring. And the only way the conflicting views regarding jurisdiction over foreign defendants might be resolved is through the action of this Court.

II. Further Delay Would Not Serve Any Interest

There is wisdom in allowing certain legal issues a period of time to percolate in the state courts and lower federal courts before presentation to the United States Supreme Court for ultimate resolution. This allows time to increase the number of judicial opinions and professional and academic commentary for this Court to consider, so as to be as fully informed as possible before setting the precedent that will thereafter govern.

The decision in *Asahi* was rendered in 1987. Since then, thousands of state and federal decisions have applied and interpreted the *Asahi* opinions on a

case-by-case basis. In addition, there have been hundreds of references to the competing views of Justice Brennan, et al., and Justice O'Connor, et al., in law reviews and treatises. The matter has been debated and studied as much as any procedural issue in recent memory. More time for more discussion is unlikely to provide any greater light to assist the Court. Further delay would serve no public interest.

III. The Issue Is Of Exceptional Importance

The importance of providing greater clarity in this area is indicated in several respects. For one, the issue arises with tremendous frequency. A Westlaw search as this petition is in draft form indicates that *Asahi* has been cited in 3,395 separate court decisions. A recent commentator has stated that the "threshold question of personal jurisdiction is one of the most litigated issues in federal and state courts." Laughlin, 37 Cap. U.L. Rev. at 712. Because this issue is presented in so many cases, the importance of clear and efficient rules for resolution of jurisdiction over foreign defendants is manifest.

Clear rules are especially important on jurisdictional issues. "Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980). *See also Hertz Corp. v. Friend*, 130 S.Ct. 1181, 1193 (2010). Based on the number of cases that have cited *Asahi* and the tremendous

frequency with which these issues arise, there has been a considerable "waste of time and resources" which greater legal clarity would reduce.

Lack of clear rules leads to unpredictability in results. That seems jurisprudentially perverse where, as here, reasonable predictability is a central concern in bringing the due process clause to bear. If the "foreseeability that is critical to due process analysis . . . [requires consideration whether] defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), then it subverts this predictability interest to continue an inconsistent morass of rules which undermine any hope of reliably predicting whether, in a particular case, a foreign defendant may be required to submit to the jurisdiction of a state or federal court. *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (due process requires "that individuals have 'fair warning' that a particular activity may subject [them] to the jurisdiction of a foreign sovereign") (quoting *Shafter v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment)).

The importance of the issue is further reflected by recognition that interstate commerce and international commerce both follow similar rules in this context. Encouraging efficiency in such commerce is key to the economic vitality of our United States. The tremendous litigation costs that have been and continue to be incurred in arguing whether a particular

court has jurisdiction to decide an issue about a matter relevant to such commerce presents a sizable burden on trade among the states and with foreign nations. This argument is presented in some detail in amicus briefs filed by the Chamber of Commerce of the United States in *J. McIntyre Machinery, Ltd. v. Nicastro*, Case No. 09-1343 and in *Goodyear Luxembourg Tires, S.A. v. Brown*, Case No. 10-76.

Whenever there exists such disparity, on an issue that may potentially determine whether a party recovers relief, there is opportunity for the mischief of forum shopping. Just to consider the example of this case, the Plaintiffs might have filed suit in Kansas, where the accident occurred, in either federal or state court. Or in Florida, where they purchased the tire, in either federal or state court. Or in Delaware, where Pirelli Tire, LLC is located, in state or federal court. Where a foreign defendant is involved, as here, with few or no direct contacts in any state beyond the movement of goods in commerce, minimum contacts analysis for due process purposes should lead to the same answer no matter which state suit is filed in, and no matter whether suit be in federal or state court. But the balkanization of law on this issue from state to state and circuit to circuit allows plaintiffs to select the forum most likely to require the foreign defendant to come and defend itself on the merits. *See* Laughlin, 37 Cap. U.L. Rev. at 712-14.

Because the jurisdictional issue arises so frequently, because such threshold questions should follow simple rules to avoid inefficiencies and

untoward costs, because of the significance of trade to our economic well being, and because the present divisions tempt forum shopping, the issue presented is of sufficient national importance to merit review by this Court.

IV. This Case Is Ideally Positioned For GVR

This Court has already recognized the need for guidance on the constitutional limits to the exercise of jurisdiction over foreign defendants, having granted review in two separate cases which provide opportunity for the Court to address the circumstances under which jurisdiction might be exerted over the foreign manufacturer of an allegedly defective product. *See J. McIntyre Machinery, Ltd. v. Nicastro*, Case No. 09-1343; *Goodyear Luxembourg Tires, S.A. v. Brown*, Case No. 10-76. Given the timing of review in these two cases, our closely trailing case is in position for resolution by GVR.

In review of *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 987 A.2d 575 (N.J.), *cert. granted*, 131 S.Ct. 63 (2010), the Court will consider whether New Jersey may exercise jurisdiction over a foreign manufacturer solely because the manufacturer targeted the United States market for the sale of its product, which was purchased by a forum state consumer. There are optimistic expectations that *Nicastro* will be used by the Court to set clearer rules for determining whether, in a particular case, due process bars a court from exercising jurisdiction over

a foreign defendant. Given the prevailing uncertainties until those clearer rules are issued, it makes sense to permit cases still open for appellate review – such as this one – to be examined in light of the precedent this Court will announce in its review of *Nicastro*.

The Court is also reviewing the jurisdictional rationale of the decision of the North Carolina Court of Appeals in *Brown v. Meter*, 681 S.E.2d 382 (N.C. Ct. App. 2009), *review denied*, 695 S.E.2d 756, 364 N.C. 128 (N.C.), *cert. granted sub nom., Goodyear Luxembourg Tires, S.A. v. Brown*, 131 S.Ct. 63 (2010). While the question in *Brown* involves general jurisdiction, rather than specific jurisdiction on a minimum contacts test, in both *Brown* and *Nicastro* the arguments feature consideration of the circumstances under which actions of a distributor or distribution network might be attributed back to the producer of an allegedly defective product in order to open the door to jurisdiction over the manufacturer or producer of a good. If the briefs and oral arguments provide any basis for prediction, there will likely be some discussion in this Court's decisions resolving *Nicastro* or *Brown*, or both, on that subject. Because the key argument raised by Mr. and Mrs. Gunn for asserting jurisdiction over Pneus has been based on the actions of other entities in distributing tires in the United States, this Court's anticipated opinions in those cases may bear strongly on the correct outcome on that question as to Pneus.

In short, the issues presented in Pneus' petition are subsumed within issues to be addressed by this Court's decisions in two other cases, both of which were argued before this Court on January 11, 2011. Accordingly, this case provides an appropriate opportunity to grant this petition, vacate the decision of Florida's Second District Court of Appeal, and remand for further consideration in light of the decisions of the Court in *Nicastro* and *Brown*, once those cases are decided.

CONCLUSION

Based on the foregoing, Petitioner, Pirelli Pneus Ltda., asks that the Court grant this petition as to the question presented, or in the alternative that the Court hold this petition until decisions are rendered in *Nicastro* and *Brown* and, thereupon, grant the petition, vacate the decision below, and remand for

further consideration in light of the decisions in those cases.

Respectfully submitted,

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PIRELLI PNEUS, LTDA,

Appellant,

v.

GARY GUNN, Individually and as Guardian of Kathy Gunn, an incapacitated person,

Appellee.

Case No. 2D10-2696

Opinion filed December 29, 2010.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Polk County; Neil A. Roddenbery, Judge.

Kevin A. Ashley of Peterson & Myers, P.A., Winter Haven, and Stephen R. Senn of Peterson & Myers, P.A., Lakeland; and C. Vernon Hartline Jr., of Hartline, Dacus, Barger, Dreyer & Kern, Dallas, Texas, for Appellant.

Peter W. van den Boom and John W. Frost, II, of Frost van

de Boom & Smith, P.A., Bartow,
for Appellee.

PER CURIAM.

Affirmed,

LaROSE, KHOUZAM, and
CRENSHAW, JJ., Concur

IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

GARY GUNN, individually and as Guardian of KATHY GUNN, his wife, an Incapacitated person,

Plaintiffs,

v.

PIRELLI TIRE LLC, a foreign limited liability company; PIRELLI NORTH AMERICA INC., a foreign corporation; FRANCISCO'S CUSTOM BODY SHOP INC., a Florida corporation d/b/a Francisco's Cycle Center; LEMANS CORPORATION, a foreign corporation, d/b/a Parts Unlimited; PIRELLI PNEUS Ltda (ex-PIRELLI PNEUS, S.A.), a foreign limited liability company; PIRELLI TYRE S.p.A., a foreign corporation; PIRELLI TYRE HOLLAND N.V., a foreign corporation; PIRELLI & C. S.p. A., a foreign Corporation,

Defendants. /

Case No.: 2008-CA-004858
Section: 15

ORDER GRANTING PIRELLI PNEUS' MOTION FOR CLARIFICATION OF THE COURT'S ORDER ISSUED MAY 6, 2010

(Filed May 20, 2010)

THIS MATTER is before the Court upon Defendant, Pirelli Pneus Ltda.'s Motion for Clarification of an order issued by this Court on May 6, 2010.

The first, second, and last paragraph of the order issued on May 6, 2010, set this Defendant apart from the other Defendants. Thus, the Court's final ruling is clear as to this Defendant. " . . . Defendant Pirelli Pneus Ltda.'s Motion to Quash Service of Process and Motion Dismiss for Lack of Jurisdiction are hereby DENIED." However, out of an abundance of caution the Court adds the following language in italics which reads as follows:

The Court is persuaded by the analysis and case law cited in each of the Defendants' (*Pirelli Tyre S.p.A., Pirelli Tyre Holland N.V., and Pirelli & C. S.p.A.*) Motions to Dismiss and Joint Reply. Thus, the Court adopts and incorporates each of the Defendants' Motion to Dismiss and Joint Reply to grant the dismissal *as to the following Defendants, Pirelli Tyre S.p.A., Pirelli Tyre Holland N.V. and Pirelli & C. S.p.A.*

AMENDED ORDER ON MULTIPLE MOTIONS TO DISMISS AND JUDICIAL NOTICE

THIS MATTER is before the Court upon each of the following Defendants, Pirelli Tyre S.p.A., Pirelli

Tyre Holland N.V., and Pirelli & C. S.p.A. Motion to Dismiss and a Joint Reply in Support of their Motions to Dismiss for Lack of Jurisdiction ("Joint Reply"); Supplemental Filing of notarized affidavits and jurat translations; Joint Response to Plaintiffs' Reply Regarding Defendants' Affidavits in Support of Dismissal for Lack of Jurisdiction; the Court's Order Allowing Defendants' to Respond, issued on April 14, 2010; and Response of Pirelli Pneus, Ltda., Pirelli Tyre, S.p.A., Pirelli Tyre Holland N.V. and Pirelli & C.S.p.A. as Directed by the Court's Order of April 14, 2010.

Defendant, Pirelli Pneus Ltda.'s Motion to Quash Service of Process and Motion Dismiss for Lack of Jurisdiction and Response to Plaintiffs' Reply Regarding Defendant's Affidavits in support of its Motion to Dismiss for Lack of Jurisdiction; and Joint Objections to Plaintiff's Motion for Judicial Notice.

Plaintiffs' Response to each of the Defendants' Motions to Dismiss for Lack of Jurisdiction and Plaintiffs' Response to Pirelli Pneus Ltda's Motion to Quash Service of Process and Motion to Dismiss for Lack of Jurisdiction. Plaintiffs' Notice of Intent to Request this Court to Take Judicial Notice and Motion for Judicial Notice; Plaintiffs' Motion to Strike Defendants' Joint Responses to Plaintiffs' Reply Regarding Defendants' Affidavits in Support of Dismissal for Lack of Jurisdiction and Motion to Strike the Supplemental Filings of Defendants' Affidavits and Objection to the Introduction of the Affidavits

into evidence post evidentiary hearing ("Motions to Strike").

The Court, having reviewed the submissions, pleadings, applicable case law, and having heard and considered the arguments of the parties at the evidentiary hearing conducted by the Court on March 18, 2010, and otherwise being informed in the matter, finds as follows:

Plaintiffs withdrew their motion to continue. The Plaintiffs argued at the evidentiary hearing the affidavits were ineffective and objected to the Court letting the Defendants' file supplemental affidavits. The Court orally denied the objection at the evidentiary hearing to allow the Defendants' to file the original affidavits. Plaintiffs subsequently filed their Motions to Strike and the Court allowed the Defendants' to answer the Plaintiffs Motions to Strike. The Defendants' filed the necessary documents which were translated. The Court finds the affidavits to be competent pursuant to Section 92.50(3), Fla. Stat.

The Court is persuaded by the analysis and case law cited in each of the Defendants' (Pirelli Tyre S.p.A., Pirelli Tyre Holland N.V., and Pirelli & C. S.p.A.) Motions to Dismiss and Joint Reply. Thus, the Court adopts and incorporates each of the Defendants' Motion to Dismiss and Joint Reply to grant the dismissal as to the following Defendants, Pirelli Tyre S.p.A., Pirelli Tyre Holland N.V., and Pirelli & C. S.p.A. The Court agrees with the analysis and case law in the Defendants' Joint Objection to Plaintiffs'

Motion for Judicial Notice. Hence, this Court adopts and incorporates by reference the Defendants' Joint Objection to Plaintiffs' Motion for Judicial Notice for the denial.

Therefore, it is **ORDERED AND ADJUDGED** that each of the Defendants, (Pirelli Tyre S.p.A., Pirelli Tyre Holland N.V., and Pirelli & C. S.p.A.) Motions to Dismiss for Lack of Jurisdiction are hereby **GRANTED**; Defendant Pirelli Pneus Ltda.'s Motion to Quash Service of Process and Motion Dismiss for Lack of Jurisdiction are hereby **DENIED**. It is further **ORDERED** that Plaintiffs' Motion for Judicial Notice and Plaintiffs' Motions to Strike are hereby **DENIED**.

DONE AND ORDERED in Bartow, Polk County, Florida on this ___ day of MAY 19 2010, 2010.

/s/ Neil A. Roddenbery
NEIL A. RODDENBERY,
Circuit Judge

[Service List Omitted In Printing]

IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

GARY GUNN, individually and as Guardian of KATHY GUNN, his wife, an Incapacitated person,

Plaintiffs,

v.

PIRELLI TIRE LLC, a foreign limited liability company; PIRELLI NORTH AMERICA INC., a foreign corporation; FRANCISCO'S CUSTOM BODY SHOP INC., a Florida corporation d/b/a Francisco's Cycle Center; LEMANS CORPORATION, a foreign corporation, d/b/a Parts Unlimited; PIRELLI PNEUS Ltda (ex-PIRELLI PNEUS, S.A.), a foreign limited liability company; PIRELLI TYRE S.p.A., a foreign corporation; PIRELLI TYRE HOLLAND N.V., a foreign corporation; PIRELLI & C. S.p. A., a foreign Corporation,

Defendants. /

Case No.: 2008-CA-004858
Section: 15

ORDER ON MULTIPLE MOTIONS TO DISMISS AND JUDICIAL NOTICE

THIS MATTER is before the Court upon each of the following Defendants, Pirelli Tyre S.p.A., Pirelli Tyre Holland N.V., and Pirelli & C. S.p.A. Motion to Dismiss and a Joint Reply in Support of their Motions to Dismiss for Lack of Jurisdiction ("Joint Reply"); Supplemental Filing of notarized affidavits and jurat translations; Joint Response to Plaintiffs' Reply Regarding Defendants' Affidavits in Support of Dismissal for Lack of Jurisdiction; the Court's Order Allowing Defendants' to Respond, issued on April 14, 2010; and Response of Pirelli Pneus, Ltda., Pirelli Tyre, S.p.A., Pirelli Tyre Holland N.V., and Pirelli & C.S.p.A. as Directed by the Court's Order of April 14, 2010.

Defendant, Pirelli Pneus Ltda.'s Motion to Quash Service of Process and Motion Dismiss for Lack of Jurisdiction and Response to Plaintiffs' Reply Regarding Defendant's Affidavits in support of its Motion to Dismiss for Lack of Jurisdiction; and Joint Objections to Plaintiff's Motion for Judicial Notice.

Plaintiffs' Response to each of the Defendants' Motions to Dismiss for Lack of Jurisdiction and Plaintiffs' Response to Pirelli Pneus Ltda's Motion to Quash Service of Process and Motion to Dismiss for Lack of Jurisdiction. Plaintiffs' Notice of Intent to Request this Court to Take Judicial Notice and Motion for Judicial Notice; Plaintiffs' Motion to Strike Defendants' Joint Responses to Plaintiffs' Reply

Regarding Defendants' Affidavits in Support of Dismissal for Lack of Jurisdiction and Motion to Strike the Supplemental Filings of Defendants' Affidavits and Objection to the Introduction of the Affidavits into evidence post evidentiary hearing ("Motions to Strike").

The Court, having reviewed the submissions, pleadings, applicable case law, and having heard and considered the arguments of the parties at the evidentiary hearing conducted by the Court on March 18, 2010, and otherwise being informed in the matter, finds as follows:

Plaintiffs withdrew their motion to continue. The Plaintiffs argued at the evidentiary hearing the affidavits were ineffective and objected to the Court letting the Defendants' file supplemental affidavits. The Court orally denied the objection at the evidentiary hearing to allow the Defendants' to file the original affidavits. Plaintiffs subsequently filed their Motions to Strike and the Court allowed the Defendants' to answer the Plaintiff's Motions to Strike. The Defendants' filed the necessary documents which were translated. The Court finds the affidavits to be competent pursuant to Section 92.50(3), Fla. Stat.

The Court is persuaded by the analysis and case law cited in each of the Defendants' Motions to Dismiss and Joint Reply. Thus, the Court adopts and incorporates each of the Defendants Motion to Dismiss and Joint Reply to grant the dismissal. The Court agrees with the analysis and case law in the

Defendants' Joint Objection to Plaintiffs' Motion for Judicial Notice. Hence, this Court adopts and incorporates by reference the Defendants' Joint Objection to Plaintiffs' Motion for Judicial Notice for the denial.

Therefore, it is **ORDERED AND ADJUDGED** that each of the Defendants, (Pirelli Tyre S.p.A., Pirelli Tyre Holland N.V., and Pirelli & C. S.p.A.) Motions to Dismiss for Lack of Jurisdiction are hereby **GRANTED**; Defendant Pirelli Pneus Ltda.'s Motion to Quash Service of Process and Motion Dismiss for Lack of Jurisdiction are hereby **DENIED**. It is further **ORDERED** that Plaintiffs' Motion for Judicial Notice and Plaintiffs' Motions to Strike are hereby **DENIED**.

DONE AND ORDERED in Bartow, Polk County, Florida on this MAY 06 2010 day of _____, 2010.

/s/ NEIL A. RODDENBERY
NEIL A. RODDENBERY,
Circuit Judge

[Service List Omitted In Printing]

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(2)

No. 10-1004

Supreme Court, U.S.
FILED
MAR 10 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PIRELLI PNEUS, LTDA,

Petitioner,

v.

GARY GUNN, Individually, and as guardian of KATHY GUNN, his wife, an incapacitated person,

Respondents.

On Petition For Writ Of Certiorari To The Second District Court Of Appeal For The State Of Florida

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QUESTION PRESENTED FOR REVIEW

Whether due process limitations permit the exercise of jurisdiction over the foreign producer of an allegedly defective product, based on the forum contacts of distributors of the product, without evidence showing either control by the producer over the distributors or some legally recognized basis for disregarding their separate corporate identities.

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STATEMENT OF THE CASE

Gary Gunn, individually and as guardian of his wife, Kathy Gunn ("Respondents") filed suit in the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, for damages suffered as a result of a defective tire manufactured by Pirelli Pneus Ltda. ("Pirelli Pneus"), under theories of strict liability in tort and negligence. Respondents' Amended Complaint contained jurisdictional allegations that Pirelli Pneus knowingly utilized a nationwide scheme to distribute its manufactured tires throughout the United States, including the State of Florida, where Respondents purchased the alleged defective tire. Respondents' Amended Complaint further alleged that as a result of said distribution scheme, Pirelli Pneus purposefully availed itself of doing business in Florida and maintained sufficient minimum contacts to justify being subject to jurisdiction in a Florida court.

Pirelli Pneus moved to dismiss Respondents' Amended Complaint for lack of jurisdiction and insufficient service of process. Pirelli Pneus filed affidavits in support of its motions, which contained averments that contested some, but not all, of the jurisdictional allegations alleged in the Respondents' Amended Complaint.

An evidentiary hearing was held on Pirelli Pneus' motion to dismiss and motion to quash service of process, at which Respondents objected to the legal sufficiency of the affidavits submitted by Pirelli

Pneus, under Fla. Stat. § 92.50(3), because the seals and signatures present on the affidavits were not legible and were written in a foreign language.[1] In response, Pirelli Pneus did not offer additional legally sufficient affidavits; evidence that the previously submitted affidavits comported with Fla. Stat. § 92.50; or live testimony supporting the averments contained in the previously submitted affidavits. Other than the alleged legally insufficient affidavits, Pirelli Pneus did not introduce any additional evidence at the evidentiary hearing that contested the jurisdictional allegations of Respondents' Amended Complaint. Instead, Pirelli Pneus requested leave to file English language translations of the seals of the affidavits after the conclusion of the evidentiary hearing. The trial court granted Pirelli Pneus' request and translations of the seals were filed six days after conclusion of the evidentiary hearing. However, the English language translations on their face failed to establish that the individual who authenticated the affidavits was authorized to administer affidavits in Brazil in compliance with Fla. Stat. § 92.50(3). The translations additionally failed to evidence that the affiants were placed under oath; that the affiants

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[1] Fla. Stat. § 92.50(3) states that oaths, affidavits, and acknowledgements, required or authorized by the laws of Florida, may be taken or administered in any foreign country, by or before any judge or justice of a court of last resort, any notary public of such foreign country, any minister, consul general, charge d'affaires, or consul of the United States resident in such country.

understand the English language; or that the affiants were known, or presented identification, to the individual who administered the affidavits. Moreover, the supplemental filing of the English language translations did not contain the name of the individual who translated the affidavits or any oath by the translator that the translation constitutes a true translation of the writing into the English language.

At the evidentiary hearing, Respondents also introduced invoices and bills of lading in support of its argument that Pirelli Pneus purposefully availed itself of doing business in the State of Florida, such that it would anticipate being haled into Florida's courts, by knowingly utilizing a scheme to distribute its products throughout Florida and the entire United States. Pirelli Pneus did not object to Respondents' introduction of said invoices and bills of lading at the evidentiary hearing.

The trial court ultimately denied Pirelli Pneus' Motion to Dismiss for Lack of Jurisdiction. The trial court granted dismissal of three other foreign Pirelli co-defendants but said corporate defendants, unlike Pirelli Pneus, were mere holding companies that did not manufacture tires, much less the allegedly defective tire that caused injury to Respondents. The trial court additionally denied Pirelli Pneus' motion to quash service of process, which was based on the state law argument that Respondents improperly served Pirelli Pneus via the Florida Secretary of State pursuant to Fla. Stat. § 48.181.

Pirelli Pneus sought review of the trial court's order denying its request for dismissal for lack of jurisdiction, and request to quash service of process, to Florida's Second District Court of Appeal. Pirelli Pneus argued in its Initial Brief that reversal of the trial court's order is warranted on state law grounds because Respondents failed to allege and prove jurisdictional facts to satisfy Florida's long-arm statute and failed to meet their evidentiary burden to even invoke consideration of federal due process limitations. Pirelli Pneus additionally argued that the evidence in the record fails to provide a basis for the exercise of jurisdiction over it pursuant to Justice O'Connor's "stream of commerce plus" test, which has been adopted and applied consistently by the Second District Court of Appeal.

In their Answer Brief, Respondents argued to the Second District Court of Appeal that the trial court's order denying Pirelli Pneus' motion to dismiss for lack of jurisdiction should be affirmed under Florida state law because the jurisdictional facts alleged in the Respondents' Amended Complaint were unrefuted by the legally insufficient affidavits submitted by Pirelli Pneus. Respondents additionally argued that Florida's exercise of jurisdiction comported with constitutional notions of due process, including satisfaction of Justice O'Connor's "stream of commerce plus" theory.

The Second District Court of Appeal affirmed, without a written opinion, the trial court's denial of Pirelli Pneus' motion to dismiss for lack of jurisdiction and motion to quash service of process. Pirelli Pneus

now petitions this Court to review the decision of the Second District Court of Appeal though same might have potentially rested on adequate and independent grounds based on Florida state law.[2]

REASONS TO DENY THE PETITION

This Court should deny Pirelli Pneus' Petition for Certiorari because this Court may not take jurisdiction to review a decision of a state court that might rest on adequate and independent state grounds. Also, the Court should deny the Petition because resolution of the alleged conflict between the courts regarding the interpretation of the plurality opinions in *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102 (1987) would not affect the lower ruling of the Second District Court of Appeal. Furthermore, the Petition is not appropriate for resolution by GVR because no conclusion can be made that the future opinions by the Court in *J. McIntyre Machinery, Ltd. v. Nicastro,* Case No. 09-1343, and *Goodyear Luxembourg Tires, S.A. v. Brown,* Case No.

[2] The Second District Court of Appeal could have rested its decision on the grounds that the affidavits submitted by Pirelli Pneus, in support of its Motion to Dismiss for Lack of Jurisdiction, were not authenticated by an individual authorized to administer affidavits in a foreign country under Fla. Stat. § 92.50(3); that the affidavits were not of proper form; or that the affidavits failed to fully refute the jurisdictional allegations contained in Respondents' Amended Complaint.

10-76, will reveal a reasonable probability that the Second District Court of Appeal would reject the basis on which its decision rests upon consideration of said future opinions.

I. The Court should not exercise its jurisdiction to review the Second District Court of Appeal's decision since it might have rested on adequate and independent state law grounds

Pursuant to Florida law, if a plaintiff's complaint alleges sufficient jurisdictional facts which demonstrate that a foreign defendant is subject to Florida's long-arm jurisdiction, the burden shifts to said foreign defendant to file a motion to dismiss, together with a legally sufficient affidavit or other sworn proof, that contests the essential jurisdictional facts contained in the plaintiff's complaint. *Hilltopper Holding Corp. v. Estate of Cutchin ex rel. Engle*, 955 So.2d 598, 601 (Fla. 2d DCA 2007); *Kin Yong Lung Indus. Co., Ltd. v. Temple*, 816 So.2d 663, 666 (Fla. 2d DCA 2002); *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla. 1989). If the affidavit filed by the foreign defendant fully disputes the jurisdictional allegations in plaintiff's complaint, the burden shifts back to the plaintiff to prove by affidavit or other sworn proof that a basis for long-arm jurisdiction over the foreign defendant exists. *Id.* However, if the foreign defendant fails to dispute the jurisdictional facts contained in plaintiff's complaint, no burden of proof shifts back to the plaintiff and the foreign

defendant's motion to dismiss for lack of jurisdiction must be denied, without any consideration of due process limitations. *Hilltopper Holding*, 955 So.2d at 601; *Lampe v. Hoyne*, 652 So.2d 424, 426 (Fla. 2d DCA 1995); *Waye v. Eddings*, 638 So.2d 582 (Fla. 1st DCA 1994).

In Pirelli Pneus' appeal of the trial court's order to the Second District Court of Appeal, Respondents argued that denial of Pirelli Pneus' motion to dismiss was proper because Pirelli Pneus failed to fully dispute the jurisdictional allegations of Respondents' Amended Complaint. This argument presented to the underlying appellate court was based on principles of Florida state law, which if accepted, would warrant affirmance of the trial court's order without further consideration of due process limitations or any other federal question.

Specifically, Respondents argued to the Second District Court of Appeal that the affidavits submitted by Pirelli Pneus, in support of its motion to dismiss for lack of jurisdiction, were legally insufficient under Florida law, and therefore may not be used to challenge jurisdiction. *Orbe v. Orbe*, 651 So.2d 1295, 1296 (Fla. 5th DCA 1995); *Ben-Aziz v. Polani*, 710 So.2d 125 (Fla. 4th DCA 1998). Respondents argued that the English language translations of the seals present on the affidavits, which were filed with the trial court six days after the conclusion of the evidentiary

hearing,[3] failed to establish that the individual who authenticated the affidavits was authorized to administer affidavits in a foreign country under Fla. Stat. § 92.50(3).[4] Respondents also argued that the English language translations of the seals failed to demonstrate that the affiants were placed under oath by the individual who administered the affidavit; that the affiants understood the English language; that the affiants were known or presented identification to the individual who administered the affidavit; the name of the individual who translated the seals; or an oath by said translator that the translation constitutes a true translation of the oath into the English language. *See Fla. Stat.* § 90.606(3); *B.C.S., S.r.l. v. Wise,* 910 So.2d 871 (Fla. 5th DCA 2005).

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[3] Respondents objected to the legal sufficiency of the affidavits during the evidentiary hearing on the basis that the Respondents were unable to determine whether the signature and seal present on the affidavits were those of an individual authorized to administer affidavits in a foreign country under Fla. Stat. § 92.50(3), because the signature and seal were not legible and written in a foreign language. In response to Respondents' objections, the trial court permitted Pirelli Pneus to file English language translations of the seals, though the evidentiary hearing had concluded.

[4] The individual who authenticated the affidavits was listed as an "authorized clerk." Respondents argued to the Second District Court of Appeal that Fla. Stat. § 92.50 does not explicitly provide that an individual holding the title "authorized clerk" may administer affidavits that will be deemed legally sufficient in the state of Florida.

Respondents alternatively argued before the Second District Court of Appeal that the affidavits submitted by Pirelli Pneus contained averments that failed to fully refute the jurisdictional allegations alleged in Respondents' Amended Complaint. As a result of said failure, Respondents argued that the burden never shifted to the Respondents to refute the allegations contained in the affidavits submitted by Pirelli Pneus, thereby requiring denial of Pirelli Pneus' Motion to Dismiss for Lack of Jurisdiction.[5]

By setting forth these referenced arguments relative to the affidavits submitted by Pirelli Pneus, the Respondents presented adequate and independent grounds based on Florida state law supporting the denial of Pirelli Pneus' Motion to Dismiss for Lack of Jurisdiction. Given that the Second District Court of Appeal's decision on review is without a written opinion, it is indeterminable whether the Second District Court of Appeal based its decision to affirm the trial court's denial of Pirelli Pneus' motion to dismiss on federal due process grounds, or on the evidentiary and procedural grounds based on Florida state law.

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[5] Respondents additionally argued that due to the fact the submitted affidavits were legally insufficient as presented without English translations at the evidentiary hearing, Pirelli Pneus failed to offer any evidence at said hearing that contested the jurisdictional allegations contained in Respondents' Amended Complaint.

It has been well established that this Court will not take jurisdiction to review a state court decision that might have rested upon an adequate and independent nonfederal ground. *Stembridge v. State of Georgia,* 343 U.S. 541, 547 (1952). This principle emanates from the Court's respect for the independence of state courts and the avoidance of rendering advisory opinions. *Michigan v. Long,* 463 U.S. 1032, 1040-42 (1983) (If the same decision would be rendered by the state court after this Court corrected its views of federal laws, this Court's review would amount to nothing more than an advisory opinion). This Court has applied this principle to decline review of state court decisions without written opinion, which on their face are inconclusive whether the state court might have rested its decision on an adequate state ground. *Durley v. Mayo,* 351 U.S. 277 (1956); *Ellis v. Dixon,* 349 U.S. 458, 459 (1955).

The state grounds brought forth in argument by the Respondents before the Second District Court of Appeal provided a legal basis to affirm the trial court's order denying Pirelli Pneus' motion to dismiss on a adequate basis independent of federal due process considerations. Therefore, under the assumption that the Second District Court of Appeal based its decision on Florida state law, this Court's review of the federal due process limitations as to the facts of the instant matter would have no effect in reconsideration of the Second District Court of Appeal's decision. For this reason, this Court should decline exercising its jurisdiction to review this matter for

the risk of issuance of an opinion merely advisory in nature. *See Coleman v. Thompson,* 501 U.S. 722, 729 (1991) ("Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory").

Moreover, Pirelli Pneus maintains the burden of demonstrating that these adequate and independent state grounds cannot account for the Second District Court of Appeal's decision. *See Durley v. Mayo,* 351 U.S. 277, 281 (1956); *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 70-71 (1948) (Party seeking review has the burden of affirmatively establishing the Court's jurisdiction). Pirelli Pneus has failed to satisfy its burden of establishing the Court's jurisdiction given that its Petition completely fails to address the adequate and independent state grounds in which the Second District Court of Appeal's decision potentially rested.

However, Pirelli Pneus did address Respondents' state law arguments in its Reply Brief to the Second District Court of Appeal. In said Brief, Pirelli Pneus set forth the argument that the referenced state grounds presented by Respondents should not be taken into consideration by the Second District Court of Appeal because: (1) Respondents' argument that the affidavits were legally insufficient should have been cross-appealed to the Second District Court of Appeal given the trial court's ruling that Pirelli Pneus' submitted affidavits were legally sufficient; and (2) that

Respondents improperly argued for the first time on appeal that Pirelli Pneus' submitted affidavits failed to fully refute the jurisdictional allegations present in Respondents' Amended Complaint.

Notwithstanding these arguments, established Florida law provides that the Second District Court of Appeal was not barred from considering Respondents' arguments relative to the insufficiency of Pirelli Pneus' submitted affidavits. Pursuant to the "tipsy coachman rule," an appellate court is permitted to affirm a decision of the trial court despite a finding of error in the trial court's reasoning if there is an alternative basis to justify affirming the decision. *Malu v. Security National Insurance Company,* 898 So.2d 69, 73 (Fla. 2005); *Dade County School Board v. Radio Station WQBA,* 731 So.2d 638, 644 (Fla. 1999) (If a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record); *Firestone v. Firestone,* 263 So.2d 223, 225 (Fla. 1972) (The findings of the lower court are not necessarily binding and controlling on appeal, and if these findings are grounded on an erroneous theory, the judgment may yet be affirmed where appellate review discloses other theories to support it).

The Florida Supreme Court has extended the "tipsy coachman rule" to provide that an appellee is not limited to the legal arguments expressly asserted as grounds for the judgment in the lower court. *Radio Station WQBA* at 645. Instead, the appellee can present any argument supported by the record even if

not expressly asserted in the trial court. *Id.* More importantly, the Florida Supreme Court has further established that an appellee "content with the judgment below need not assign error in order to support that judgment and is not limited in the appellate courts to the theories of recovery stated by the trial court." *Malu* at 73; *Radio Station WQBA* at 645 (Appellee need not raise and preserve alternative grounds for the lower court's judgment in order to assert them in defense when the appellant attacks the judgment on appeal); *MacNeill v. O'Neal,* 238 So.2d 614, 615 (Fla. 1970) (Appellee not aggrieved by the lower court's decision need not file cross-assignments of error in order to have the points considered on appeal).

Pursuant to these holdings of the Florida Supreme Court, the Second District Court of Appeal would not have committed error in considering and resting its decision on the state law grounds argued in Respondents' Answer Brief in the lower appeal. Therefore, Pirelli Pneus' previous argument, which Respondents anticipate being reasserted before this Court, that Respondents should have been precluded from presenting arguments on the sufficiency of Pirelli Pneus' submitted affidavits to the Second District Court of Appeal, fails.

For these foregoing reasons, the Court should not exercise jurisdiction to review the Second District Court of Appeal's decision in the instant matter.

II. The Fact that Courts are in Conflict Regarding the Application of the Stream of Commerce Theory promulgated in *Asahi* has no Effect on the Second District Court of Appeal's decision

Pirelli Pneus argues that certiorari is warranted because state and federal courts are in conflict regarding the exercise of jurisdiction over foreign manufacturers who place defective products in the stream of commerce for ultimate arrival in the United States. However, the conflict addressed by Petitioner can be summarized as a conflict between which of two theories should be applied in determining whether due process limitations are satisfied by a forum's exercise of jurisdiction over a foreign defendant who places a defective product into the stream of commerce. Given that the Second District Court of Appeal for the State of Florida has adopted the more stringent of the two established "stream of commerce" theories, this Court's potential resolution of which "stream of commerce" theory should be applied in evaluation of due process limitations concerning in personam jurisdiction would have no effect on the Second District Court of Appeal's decision in the instant matter.

In *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102 (1987), this Court interpreted the "stream of commerce" theory of personal jurisdiction which had been previously set forth in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). Such interpretation consisted of two

plurality opinions, one by Justice O'Connor and one by Justice Brennan, which provided two divergent views of the stream of commerce principles set forth in *World-Wide Volkswagen*.

In *Asahi*, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia, opined that mere awareness resulting from placing a product in the stream of commerce, without more, does not constitute an act purposefully directed toward a forum State so as to be adequate for the exercise of jurisdiction over a foreign defendant. *Asahi*, 480 U.S. at 112. Instead, Justice O'Connor iterated that a foreign defendant must undertake additional conduct indicating an intent or purpose by said defendant to serve the market in the forum State. *Id.*

Justice Brennan, joined by Justices White, Marshall, and Blackmun, provided a less stringent view of the stream of commerce theory than Justice O'Connor, opining that a foreign defendant who places goods in the stream of commerce directly benefits from the sale of the product in the forum State, and indirectly benefits from the protection of the forum State's laws regulating commercial activity. *Asahi*, 480 U.S. at 117. Justice Brennan asserted that since these benefits accrue regardless if the foreign defendant engages in additional conduct directed toward the forum State, jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause without a required showing of additional conduct directed

toward the forum state. *Id.* Accordingly, Justice Brennan's view disagrees with Justice O'Connor's requirement that a foreign defendant, who places its product into the stream of commerce, must demonstrate an intent or purpose to serve the market in the forum State in order for that state to properly exercise its jurisdiction over the foreign defendant.

As discussed in Pirelli Pneus' Petition, state and federal courts have conflicted for the past twenty-five years regarding whether Justice O'Connor's more stringent "stream of commerce plus" theory or Justice Brennan's more lenient pure "stream of commerce" theory is the proper standard to be applied in determining whether a forum's exercise of jurisdiction over a foreign defendant comports with due process limitations. *See* Petition for Writ of Certiorari, p. 6-7. Nonetheless, Petitioner's request for certiorari on the basis of said conflict between the courts is improper given the fact that the Second District Court of Appeal for the State of Florida has adopted Justice O'Connor's more stringent "stream of commerce plus" theory. *See Kin Yong Lung Indus. Co., Ltd. v. Temple,* 816 So.2d 663 (Fla. 2d DCA 2002); *Shin-Kobe Elec. Machinery Co., Ltd. v. Rockwell,* 750 So.2d 67 (Fla. 2d DCA 1999).

Justice O'Connor's "stream of commerce plus" theory was presented and argued by both Petitioner and Respondents to the Second District Court of Appeal in the instant matter. In its Initial Brief, Pirelli Pneus specifically cited Justice O'Connor's opinion in *Asahi*, together with case law from the

Second District Court of Appeal adopting O'Connor's viewpoint, in support of its argument that due process limitations prevent the State of Florida from exercising jurisdiction over Pirelli Pneus pursuant to the stream of commerce theory. In their Answer Brief, the Respondents acknowledged the Second District Court of Appeal's adoption of the O'Connor standard and argued that the factual circumstances of the instant matter would not defeat the proper exercise of jurisdiction by the State of Florida under the "stream of commerce plus" theory. In fact, the parties never referenced or addressed Justice Brennan's conflicting pure stream of commerce theory in any of the briefs filed with the Second District Court of Appeal.

Therefore, if we assume that the Second District Court of Appeal's decision was decided solely on the stream of commerce theory of jurisdiction, it is without doubt that the court applied Justice O'Connor's more stringent "stream of commerce plus" theory, as opposed to Justice Brennan's more lenient "stream of commerce" theory. Given that the stream of commerce theory containing the higher due process threshold would have been applied in the instant matter, Pirelli Pneus' request for this Court to resolve the conflict between Justice O'Connor and Justice Brennan's stream of commerce theories would result in an irrelevant, advisory opinion to the litigants. *See Alabama v. Shelton,* 535 U.S. 654, 676 (2002) (The Court has a longstanding refusal to issue advisory opinions). Clearly, the Second District Court of Appeal would uphold the exercise of jurisdiction over Pirelli Pneus

under Justice Brennan's standard if it upheld the exercise of jurisdiction over same under Justice O'Connor's "stream of commerce plus" standard. *Osorio v. Dole Food Co.*, 2009 WL 48189 (S.D. Fla. 2009) (Where the contacts meet O'Connor's most stringent standard, there is no need to consider whether the contacts would meet the other standards); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993) (No need to determine stream of commerce standard which actually controls the case when jurisdiction over defendant is consistent with due process under O'Connor's more stringent "stream of commerce plus" analysis).

For these reasons, Pirelli Pneus' request for this Court to review the jurisdictional issues decided by the Second District Court of Appeal on the basis that state and federal courts are in conflict over which stream of commerce theory to apply is improper. Conversely, a decision more appropriate for review by this Court would involve a lower state or appellate tribunal upholding the exercise of jurisdiction over a foreign defendant through application of Justice Brennan's pure stream of commerce theory. *See J. McIntyre Machinery, Ltd. v. Nicastro*, Case No. 09-1343; *Goodyear Luxembourg Tires, S.A. v. Brown*, Case No. 10-76. The foreign defendant in such an instance would have a legitimate argument regarding the conflict between state and federal courts' application of the *Asahi* plurality opinions, because said defendant could be subject to jurisdiction in the United States tribunals applying Justice Brennan's

theory while simultaneously exempted from jurisdiction in tribunals applying Justice O'Connor's stricter "stream of commerce plus" theory. However, in the present matter, any resolution by this Court of the present conflict regarding the application of the *Asahi* plurality opinions would not subject Pirelli Pneus to a more stringent stream of commerce test than would have been applied by the Second District Court of Appeal.

Pirelli Pneus further points out that review of the stream of commerce conflict between the courts is warranted because of the potential danger of forum shopping by a plaintiff selecting the forum most likely to require the foreign defendant to come and defend itself on the merits. However, alleged forum shopping is clearly absent in the instant matter as Respondents brought suit against Pirelli Pneus in a forum that applies the stricter O'Connor "stream of commerce plus" standard. Given that Pirelli Pneus has not been aggrieved by an act of forum shopping, and that Pirelli Pneus had the benefit of arguing its case in a forum that applies the stricter O'Connor standard, any solemnization of the *Asahi* opinions by review of this Court would not affect the Second District Court of Appeal's decision. Again, a more appropriate decision for review of the *Asahi* opinions, and the potential danger of forum shopping, would arise from a forum that applies the Brennan standard, due to the potential prejudice suffered by a foreign defendant by the plaintiff choosing a forum

with less stringent due process requirements for the exercise of its jurisdiction over a foreign defendant.

Pirelli Pneus additionally argues that this Court should grant review to resolve conflict between an apparent split in authority over evidentiary burdens and procedures utilized in resolving jurisdictional disputes. In support of its argument, Pirelli Pneus cites decisions of various Federal Circuit Courts that divulge on the exact evidentiary and procedural burdens that should be placed on the respective plaintiff and defendants in a jurisdictional dispute. Notwithstanding same, the evidentiary burden and procedures utilized in the instant matter are not available for review by this Court as they are matters of Florida state law. *See generally Venetian Salami*, 554 So.2d 499 (Fla. 1989); *Hilltopper Holding Corp.*, 955 So.2d 598 (Fla. 2d DCA 2007). Therefore, any conflict between the evidentiary burdens and procedures undertaken in the Federal Circuit Court cases cited by Pirelli Pneus is impertinent to the decision of the Second District Court of Appeal.[6] More importantly, however, is the fact that Pirelli Pneus never raised any dispute concerning the evidentiary burdens or procedures that would have been applied pursuant to

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[6] Only one Federal Circuit expressly refuses to transfer the burden of proving fairness of the exercise of jurisdiction by a forum to the foreign defendant. *See* Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 Cap. U.L. Rev. at 711.

Florida law in its appeal to the Second District Court of Appeal in the instant matter.

Throughout its Petition, Pirelli Pneus laments that thousands of state and federal decisions have applied and interpreted the *Asahi* opinions on a case-by-case basis since they were rendered in 1987. In light of this fact, it can be assumed that this Court has previously denied hundreds of requests for certiorari review of the stream of commerce theory from lower courts that applied the O'Connor standard, that applied the Brennan standard, and which wrote significantly detailed opinions outlining their application of the *Asahi* standards. Therefore, Respondents find it disingenuous for Pirelli Pneus to set forth that the underlying decision from the Second District Court of Appeal, which is without written opinion and could have only been decided under the stricter O'Connor "stream of commerce plus" test, is the proper decision for the Court to review a twenty-five year conflict of federal and state jurisprudence. For the reasons set forth herein, Respondents believe that denial of Pirelli Pneus' Petition is appropriate.

III. Contrary to Pirelli Pneus' Contentions, this Case is not Ideally Positioned for GVR

In support of its argument that a GVR is warranted in the instant matter, Pirelli Pneus argues that two separate cases currently pending on review before this Court will result in opinions that will call the Second District Court of Appeal's decision into

question. *See J. McIntyre Machinery, Ltd. v. Nicastro,* Case No. 09-1343; *Goodyear Luxembourg Tires, S.A. v. Brown,* Case No. 10-76. For this reason, Pirelli Pneus requests that the Court hold this petition until decisions in these referenced cases are rendered, grant its Petition, vacate the decision of the Second District Court of Appeal, and remand for further consideration in light of the decisions in those cases.

However, upon application of this Court's standard for issuing a GVR to the instant matter, in light of the legal issues present for review in the *Nicastro* and *Brown* cases, it is evident that contrary to Pirelli Pneus' contentions, this case is not properly positioned for GVR.

This Court has established that an order granting certiorari, vacating the judgment below, and remanding the case (GVR) is *potentially* appropriate when intervening developments, that this Court has reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter. *Lawrence v. Chater,* 516 U.S. 163, 167 (1996).

As previously discussed herein, the decision below by the Second District Court of Appeal, without a written opinion, might have potentially rested on adequate and independent state grounds. Accordingly, it is indeterminable whether the Second District

Court of Appeal even determined the federal question of due process limitations or any federal question related to the questions currently presented for review in *Nicastro* and *Brown*. As such, no basis exists for a conclusion that the Second District Court of Appeal's decision rests upon a premise that would be rejected upon consideration of the future opinions issued by this Court in the *Nicastro* and *Brown* cases. If the Second District Court of Appeal's decision was indeed based on adequate and independent state grounds, any further redetermination of the intervening decisions in *Nicastro* and *Brown* would not affect the ultimate outcome of the Second District Court of Appeal's decision.

Additionally, any intervening opinion by this Court in review of *Nicastro* and *Brown* would not affect the ultimate outcome of the Second District Court of Appeal's decision in the instant matter even if we assume said decision rested on federal due process considerations. The state court decisions on review before this Court in *Nicastro* and *Brown* specifically concern the express acceptance of a pure stream of commerce theory, and simultaneous rejection of the more stringent O'Connor standard, that would have been applied by the Second District Court of Appeal in the instant matter.

In *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 987 A.2d 575 (N.J. 2010), *cert. granted*, 131 S.Ct. 63 (2010), the Supreme Court of New Jersey followed its own precedent established in *Charles Gendler & Co., Inc. v. Telecom Equipment Corp.*, 102

N.J. 460, 508 A.2d 1127 (N.J. 1986), a pre-*Asahi* opinion which articulated a stream of commerce theory akin to Justice Brennan's pure stream of commerce standard. As specifically stated by the New Jersey Supreme Court in *Nicastro*:

> "Today, we reaffirm the reasoning of our decision in *Charles Gendler*, and hold that a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction of a New Jersey court in a product-liability action. All in all, *Charles Gendler,* in pronouncing when a State court can exercise personal jurisdiction over a defendant based on the stream-of-commerce doctrine, gave a faithful and fair reading of *World Wide Volkswagen,* one that is more reflective of Justice Brennan's views expressed in *Asahi.*"

Nicastro, 201 N.J. at 73.

In *Brown v. Meter,* 681 S.E.2d 382 (N.C. Ct. App. 2009), *cert. granted*, 131 S.Ct. 63 (2010), the Court of Appeals of North Carolina, in ruling that the stream of commerce analysis may apply to consideration of general in personam jurisdiction, followed North Carolina state court precedent in declining to follow the "stream of commerce plus" standard advocated by Justice O'Connor in *Asahi*. *Brown,* 681 S.E.2d at 390.

Based on the lower court rulings in *Nicastro* and *Brown*, it can be assumed that the crux of this Court's review of *Nicastro* and *Brown* will concern a clarification of the divulging stream of commerce standards promulgated in *Asahi* and a clearer determination of whether the O'Connor standard, or a less stringent pure stream of commerce theory, is the appropriate test for consideration of due process limitations in the exercise of in personam jurisdiction.

In application to the instant matter, if this Court fully adopts a pure stream of commerce theory in its future opinions in *Nicastro* and *Brown*, the Second District Court of Appeal would clearly not reject its decision that would have rested on the stricter "stream of commerce plus" test. Moreover, if this Court fully adopts the "stream of commerce plus" test, it cannot be said that any intervening development arose that the Second District Court of Appeal did not fully consider in potentially resting its decision on federal due process grounds.

For these reasons, a GVR order is not appropriate under the standard promulgated by this Court in *Lawrence v. Chater*, 516 U.S. 163 (1996).

CONCLUSION

For the reasons set forth herein, this Court should deny the Petition for Writ of Certiorari and deny Pirelli Pneus' request for GVR.

Respectfully submitted,

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